

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WILLIAMS,

Defendant-Appellant

UNPUBLISHED

October 29, 2002

No. 228730

Saginaw Circuit Court

LC No. 99-018102-FC

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with intent to commit great bodily harm, MCL 750.84, carrying a dangerous weapon with unlawful intent, MCL 750.226, and resisting arrest of a peace officer, MCL 750.479a(6). Defendant was sentenced to concurrent sentences of 38 months' to 10 years' imprisonment, 57 months' to 10 years' imprisonment¹, 23 months' to 5 years' imprisonment, and 366 days' to 2 years' imprisonment, respectively. Defendant was also convicted of attempting to disarm a police officer, MCL 750.479b(2), and was sentenced to 40 to 60 months' imprisonment to be served consecutive to his longest sentence of 57 months' to 10 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's only issue on appeal is whether the trial court abused its discretion when it sentenced defendant on the attempting to disarm a police officer conviction.² Because defendant's offenses occurred after January 1, 1999, on November 28, 1999, the statutory guidelines apply. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000).

Defendant's sentencing guidelines range for his attempting to disarm a police officer conviction was 12 to 24 months' imprisonment. Defendant received 40 to 60 months'

¹ Defendant received 38 months' to 10 years' imprisonment for one of the assault with intent to commit great bodily harm counts, and 57 months' to 10 years' imprisonment for the other two counts.

² Defendant filed a notice with this Court on June 20, 2001 in which he withdrew his second issue.

imprisonment, an upward departure. In reviewing a departure from the guidelines' range, the existence of a particular factor is reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo, and the determination that the factor was a substantial and compelling reason for departure is reviewed for an abuse of discretion. *People v Babcock (After Remand)*, 250 Mich App 463, 467; 648 NW2d 221 (2002) (internal citations omitted).

Generally, a court is required to impose a minimum sentence with the guidelines range. *Id.* at 465. However, a court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). This Court has stated that "substantial and compelling reasons exist only in exceptional cases and that the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence." *Babcock, supra* at 466-467.

The factors the court relies on in determining that there are substantial and compelling reasons to justify its departure must be objective and verifiable. *Id.* at 467. "Objective and verifiable" means that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

In this case, regarding the upward departure, the court stated,

That sentence does exceed the sentencing guidelines. The guidelines have been scored 12 to 24. The record that the Court has made here [is] that his struggle, this violent, violent, lengthy struggle between the defendant and the two police officers went on for a period of time -- the testimony was that Mr. Williams was shaking Officer Camp off of him, and Officer Camp is a very large strapping young man, but Mr. Williams was shaking him off like a rag doll. There's no doubt in the Court's mind that Mr. Williams would have used the gun had he been able to disarm Officer Camp, and for that reason the Court is imposing a lengthier sentence.

Defendant argues that the court improperly considered facts which were already taken into account by the scoring variables. The court may base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range if the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3). Given the length and violent nature of the struggle and the degree to which defendant went in order to harm or attempt to harm the police officers, we believe the court properly determined that offense variables did not give sufficient weight to these characteristics.

Defendant also asserts that the court's conclusion that defendant would have used the gun had he managed to disarm the officer, was pure speculation, and, therefore, not objective and verifiable. We disagree. Defendant had been on a five-day drug and drinking binge which

culminated in his assault of his fiancée. When police officers arrived, defendant stated that they would have to kill him before they could take him to jail. Defendant violently resisted arrest. He broke a vase and used the jagged edges as a weapon, bit three police officers and broke the nose of one officer, used an officer's handcuffs, a bottle and a flashlight as a weapon, and attempted to take an officer's gun. Furthermore, defendant repeatedly told the police officers that he was going to kill them. Also, defendant's fiancée testified that defendant told her on numerous occasions that if the police ever tried to take him to jail, he would take the officer's gun and kill the officer, her, and himself. We believe that the court's conclusion was not speculative, but rather was logically and reasonably drawn from the facts of this case.

Defendant further contends that by concluding that defendant would have used the gun had he disarmed the police officer, the court made an independent finding of guilt, and sentenced defendant as if he had been convicted of assault with intent to commit murder. There is no evidence that the court made an independent finding of guilt. Furthermore, a court may conclude by a preponderance of the evidence that a defendant committed the crime charged, even though the defendant was convicted of a lesser offense, and may consider that greater crime in sentencing. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Given defendant's actions described above, we believe that the evidence supported, by a preponderance, a charge of assault with intent to commit murder, and the court could have considered this in sentencing.

Finally, defendant argues that the court abused its discretion by imposing a consecutive sentence which was disproportionate to the offense and the offender. A sentence under the statutory guidelines which departs from the sentencing guidelines must still be proportionate. *Hegwood, supra* at 437 n 10; *Babcock, supra* at 468-469. Defendant's argument is unpersuasive for two reasons. First, the proportionate character of sentences is judged individually and not cumulatively. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). Therefore, the mere fact that defendant's sentence for attempting to disarm a police officer was consecutive does not make it disproportionate.³ *People v Clarke*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Second, defendant's sentence only represented a sixteen month upward departure. Given the severity of the struggle and the likely consequence had defendant completed the offense, we believe that defendant's sentence of 40 to 60 months' was proportionate to the seriousness of the offense.

In conclusion, we hold that the factors the court considered in determining whether a sentencing departure was warranted were objective and verifiable, the court did not abuse its discretion in finding substantial and compelling reasons to justify its departure, nor was defendant's sentence disproportionate. Defendant told police officers that they would have to kill him in order to take him to jail, told the officers repeatedly that he was going to kill them, and aggressively resisted arrest. In attempting to disarm the police officer, defendant engaged in

³ Consecutive sentencing for this offense is specifically authorized by MCL 750.479b(2).

a very violent struggle in which he injured several police officers. Moreover, defendant's sentence only represented a sixteen month upward departure.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R Smolenski

I concur in result only.

/s/ Henry William Saad